(3)

Supreme Court, U.S.
FILED
APR 3 1997
OFFICE OF THE CLERK

No. 96-1769

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

OHIO ADULT PAROLE AUTHORITY, et al.,

PETITIONERS,

-vs-

EUGENE WOODARD,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Respondent, Eugene Woodard, through undersigned counsel, respectfully requests leave to file his brief in opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit without prepayment of costs or fees and to proceed *in forma pauperis* pursuant to Rule 39.

Respondent is represented by the Office of the Ohio Public Defender in post-conviction proceedings in the State courts. Respondent is proceeding *in forma pauperis* during his post-conviction appeals.

87 pp

Respondent's affidavit in support of this motion is attached hereto.

Respectfully submitted,

DAVID H. BODIKER - 0016590
Ohio Public Defender

MICHAEL J. BENZA - 0061454
Assistant State Public Defender
Counsel of Record

RICHARD J. VICKERS - 0032997
Post-Conviction Supervisor,
Death Penalty Division

Office of the Ohio Public Defender
8 East Long Street - 11th Floor
Columbus, Ohio 43215
(614) 466-5394

COUNSEL FOR RESPONDENT

No. 96-1769

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

OHIO ADULT PAROLE AUTHORITY, et al.

PETITIONER,

-vs-

EUGENE WOODARD,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

AFFIDAVIT OF INDIGENCY

I, EUGENE WOODARD, being first duly sworn, depose and say that in support of my Brief in Opposition to Petition for a Writ of Certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of petitioning for a Writ of Certiorari are true.

1. Are you presently employed? Yes

A. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. 16.00/MONTH · MANSFIELD CORRECTIONAL INSTITUTION

B. If the answer is no, state the date of your last employment and the amount of the salary or wages per month which you received. —

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? No

A. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months. —

3. Do you own any cash or checking or savings account? _____

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property excluding ordinary household furniture and clothing? No

A. If the answer is yes, describe the property and state its approximate value.

—

5. List the persons who are dependent upon you for support and state your relationship to those persons. None

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Eugene Woodard
EUGENE WOODARD

Duly witnessed and sworn before me, a Notary Public, this 27th day of May, 1997.

NOTARY PUBLIC
MICHAEL JOHN BENZA
NOTARY PUBLIC, STATE OF OHIO
My commission has no expiration date.
Section 147.03 R.C

No. 96-1769

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

OHIO ADULT PAROLE AUTHORITY, et al.,

Petitioners,

-vs-

EUGENE WOODARD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT WOODARD'S BRIEF IN OPPOSITION

DAVID H. BODIKER - 0016590
Ohio Public Defender

RICHARD VICKERS - 0032997
Post-Conviction Supervisor,
Death Penalty Division

MICHAEL BENZA - 0061454
Assistant State Public Defender
Counsel of Record

Office of the Ohio Public Defender
8 East Long Street, 11th Floor
Columbus, Ohio 43215
(614) 466-5394

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

	Page No.
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
QUESTIONS PRESENTED	iii
STATEMENT OF THE CASE	1
REASONS WHY THE PETITION SHOULD BE DENIED	
I. EXECUTIVE CLEMENCY IS INTEGRAL IN THE CRIMINAL JUSTICE SYSTEM AND THE DEATH PENALTY SCHEME AND IMPLICATES AN INMATE'S DUE PROCESS RIGHTS UNDER *EVITTS*.	1
II. THE DECISION OF THE COURT BELOW THAT OHIO'S CLEMENCY PROCEDURE CREATES AN UNCONSTITUTIONAL CONDITION IS SUPPORTED BY ESTABLISHED LAW AND DOES NOT THREATEN STATE EXECUTIVE CLEMENCY DECISIONS.	5
CONCLUSION	8
APPENDIX:	
U.S. Const., amend. V	A-1
U.S. Const., amend. VIII	A-2
U.S. Const., amend. XIV	A-3
Ohio Const. art. III, Sec. 11	A-4
Ohio Rev. Code Ann. Sec. 2967.07	A-5
Ohio Death Penalty Clemency Procedure	A-6

TABLE OF AUTHORITIES

	PAGE NO.
CASES:	
Baxter v. Palmigiano, 425 U.S. 308 (1976)	6, 7
Evitts v. Lucey, 469 U.S. 387 (1985)	2, 3, 4, 5
Ex Parte Grossman, 267 U.S. 87 (1925)	2
Furman v. Georgia, 408 U.S. 238 (1972)	3
Griffin v. Illinois, 351 U.S. 12 (1956)	2
Herrera v. Collins, 506 U.S. 390 (1993)	2, 3, 4, 6
Herring v. New York, 422 U.S. 853 (1975)	3
Lefkowitz v. Turley, 414 U.S. 70 (1973)	7
Morrissey v. Brewer, 408 U.S. 471 (1972)	4
Woodard v. Ohio Adult Parole Authority, 107 F.3d 1178 (6th Cir. 1997)	2, 3, 4, 5, 6, 7
CONSTITUTIONAL PROVISIONS:	
U.S. Const., amend. V	5, 6, 7
U.S. Const., amend. VIII	3
U.S. Const., amend. XIV	3
Ohio Const. art. III, Sec. 11	3
STATUTES:	
Ohio Rev. Code Ann. Sec. 2967.07	3
OTHER AUTHORITIES:	
Ohio Death Penalty Clemency Procedure	2, 3, 4, 5, 6
The Federalist Papers, No. 74, at 341 (Hallowell ed. 1842)	2

CAPITAL CASE

QUESTIONS PRESENTED

I. **WHETHER OHIO'S DEATH PENALTY EXECUTIVE CLEMENCY PROCEDURES ARE INTEGRAL IN THE CRIMINAL JUSTICE SYSTEM AND IMPLICATES THE DUE PROCESS PROVISIONS UNDER EVITTS V. LUCEY, 469 U.S. 387 (1985)?**

II. **DOES OHIO'S DEATH PENALTY CLEMENCY PROCEDURE IMPOSE AN UNCONSTITUTIONAL CONDITION ON AN INMATE'S FIFTH AND FOURTEENTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION BY INITIATING A CLEMENCY REVIEW WHILE THE INMATE IS SEEKING POST-CONVICTION RELIEF?**

STATEMENT OF THE CASE

Respondent generally accepts Petitioners' characterization of the statement of the case. Petitioners' factual inaccuracies pertaining to the crime for which Mr. Woodard was convicted and sentenced are irrelevant to the issue before the Court. There are however some omissions that must be addressed.

On July 18, 1994, the Ohio Supreme Court set Mr. Woodard's execution date for October 7, 1994.

On August 16, 1994, Mr. Woodard applied for a stay of execution to pursue state post-conviction proceedings.

On August 24, 1994, forty-five days before Mr. Woodard's scheduled execution, the Ohio Supreme Court issued a stay of execution as a matter of right.

On September 6, 1994, Petitioners informally notified counsel for Mr. Woodard that the clemency interview of Mr. Woodard was scheduled for September 9, 1994 and that the clemency hearing was scheduled for September 16, 1994. Attempts by counsel for Mr. Woodard to participate in the clemency process were met with silence from Petitioners.

REASONS WHY THE PETITION SHOULD BE DENIED

I. **EXECUTIVE CLEMENCY IS INTEGRAL IN THE CRIMINAL JUSTICE SYSTEM AND THE DEATH PENALTY SCHEME AND IMPLICATES AN INMATE'S DUE PROCESS RIGHTS UNDER *EVITTS*.**

Contrary to Petitioners' claim that this issue should be immediately reviewed, Pet. for Writ at 15, review by this Court is premature as to the ultimate issue. The Sixth Circuit simply remanded this matter for further factual development. The lower courts are better suited to

conduct this fact finding and make the initial determination of what process is due. Then, if necessary, this Court can review the matter with the benefit of a complete factual record and legal analysis. Therefore, the Petition for Writ of Certiorari should be denied.

Assuming *arguendo* that this issue is ripe for this Court's review, petitioners' argument that Evitts v. Lucey, 469 U.S. 387 (1985), is inapplicable is without merit. The Sixth Circuit did not expand concepts of due process but rather applied existing principles to the important process of death penalty clemency. If a state acts in a field that is discretionary, that act must be in accord with the Due Process Clause. Evitts, 469 U.S. at 401. In Evitts, this Court held that "if a State has created appellate courts as 'an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant,' the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." 469 U.S. at 393; quoting Griffin v. Illinois, 351 U.S. 12, 18 (1956). The history of executive clemency in this country demonstrates its integral role in the criminal justice system. See The Federalist Papers, No. 74, at 341 (Hallowell ed. 1842); Ex Parte Grossman, 267 U.S. 87, 120-121 (1925). Above all, a capital defendant's only avenue to raise a free standing claim of "actual innocence," after trial, is clemency. Herrera v. Collins, 506 U.S. 390, 411 (1993). Ohio's clemency procedure is an integral part of the determination of a capital defendant's culpability because it is the only opportunity to raise a claim of innocence. Moreover, Ohio's clemency process is a mandatory process conducted to ensure the Governor makes an informed decision before execution. Because of this unique situation the concepts of Evitts are applicable.

The Sixth Circuit Court of Appeals determined that the Due Process Clause is implicated in Ohio's Death Penalty Clemency Procedure (hereinafter "Clemency Procedure"). Woodard v.

Ohio Adult Parole Authority, 107 F.3d 1178 (6th Cir. 1997). The Clemency Procedure requires a mandatory recommendation and a "thorough investigation" by the Adult Parole Authority (hereinafter "APA") before the Governor makes a clemency decision. Article III, Section 11 of the Ohio Constitution; Ohio Rev. Code Ann. Sec. 2967.07 (Anderson 1994). The APA's investigation includes an uncounseled interview with the inmate (only if the inmate requests one), a hearing (neither the inmate or his counsel are permitted to attend, but the prosecutor, trial judge, and victim's family are permitted to attend), and a review of the inmate's file. Death Penalty Clemency Procedure, Sec. VI(B)(C); (Sec. VI is typed as Sec. IV Procedure). The Sixth Circuit remanded the matter to the District Court to develop the record in order to determine the amount of process that is due. Woodard, 107 F.3d at 1187. The Court recognized that the level of process due may "be minimal, perhaps even barely perceptible" but that further factual development is necessary to decide this issue. Id.

The Court based its opinion on the maxim that executive clemency is the fail safe mechanism within a system that promotes the ultimate objective that the guilty be convicted and the innocent go free. Id. at 1186-88. See also Evitts v. Lucey, 469 U.S. 387, 394, citing Herring v. New York, 422 U.S. 853, 862 (1975). A death penalty scheme without an opportunity for clemency results in a death penalty scheme that smacks of avarice, arbitrariness and caprice in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States. Furman v. Georgia, 408 U.S. 238 (1972). "Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." Herrera, 560 U.S. at 411. In fact, every state that imposes the death penalty has a mechanism for a capital defendant to file for clemency. Id. 560 U.S. at 414;

Woodard, 107 F.3d at 1187. As clemency is an integral part of a capital scheme some level of due process protection is warranted. See Evitts, 469 U.S. 387. As the Sixth Circuit pointed out, there is a point where limitations on the procedure for making a clemency decision are so extreme that the procedure offends federal due process concerns. Woodard, 107 F.3d at 1188. In order to ensure that clemency satisfies its ultimate goal, some level of process is due. It was on this issue that the Sixth Circuit remanded the matter.

While the Governor's authority to grant clemency is discretionary, the Clemency Procedure is mandatory. In Morrissey v. Brewer, 408 U.S. 471 (1972), this Court held that a state has the discretion in setting policies for parole determinations but those policies must be in accord with the Due Process Clause. The discretionary nature governing parole determinations and the procedures guiding the clemency application process are analogous. Parole is "an integral part of the penological system," id. 408 U.S. at 477, and clemency is integral in the finality of the criminal justice system. Herrera, 506 U.S. at 411. Parole and clemency occur after criminal prosecution and the imposition of sentence. Both are then investigated by a board with discretionary authority to make a determination. Morrissey, 408 U.S. at 478. Just as parole determinations must be guided by basic fairness to avoid arbitrariness, so must clemency determinations. See Morrissey, 408 U.S. at 484. Ohio's clemency procedure guides a discretionary function of the APA and must comport with the due process clause under Evitts.

The Due Process Clause also mandates that the procedures enacted be a meaningful ritual. Evitts, 469 U.S. at 394. As the Sixth Circuit noted, it would be a meaningless ritual if a State simply enacted "a procedure where a Governor or parole board merely pulled names out of a lottery bin or flipped coins to make clemency decisions" because it would offend federal due

process. Woodard, 107 F.3d at 1188. The Sixth Circuit remanded the case back to the District Court to develop the record to determine whether the procedure adopted by Ohio is a meaningless ritual and what level of due process is required to ensure the validity of the process.

The Sixth Circuit held that Ohio's Clemency Procedure implicates due process concerns under Evitts. However, the Court remanded this matter to develop the facts in order to determine the level of process due because the District Court is better suited to make these initial determinations. This issue is untimely before this Court and therefore, the Petition for Writ of Certiorari should be denied.

II. THE DECISION OF THE COURT BELOW THAT OHIO'S CLEMENCY PROCEDURE CREATES AN UNCONSTITUTIONAL CONDITION IS SUPPORTED BY ESTABLISHED LAW AND DOES NOT THREATEN STATE EXECUTIVE CLEMENCY DECISIONS.

The Sixth Circuit additionally remanded this case back to the District Court to determine whether Ohio's Clemency Procedure imposes an unconstitutional condition on Mr. Woodard's Fifth Amendment right to remain silent. In the case at hand, a clemency review is being forced upon a death row inmate while the inmate pursues state post-conviction relief. Ohio's Clemency Procedure does not provide the inmate with any information whether the review implicates his Fifth Amendment right against self-incrimination. The State of Ohio in the case at bar is forcing Respondent into an unconstitutional condition by implicating Respondent's Fifth Amendment right against self-incrimination. The Sixth Circuit held that Ohio's clemency procedure presents Respondent with an unconstitutional condition because Respondent has to choose which

mechanism he wants to pursue, clemency or post-conviction. Woodard, 107 F.3d at 1192-93. The Court held that "[a] coerced waiver of the privilege is particularly troubling here, where the state has arranged for the clemency review process to take place before or during Woodard's post-conviction proceedings in state court." Id. The Court went on to state that, to participate meaningfully during the clemency process, Mr. Woodard has to be open and frank with the parole board for a meaningful clemency review and waive his Fifth Amendment right against self-incrimination. Id. The Court held that the necessity to speak openly with the state is greater than in Baxter v. Palmigiano, 425 U.S. 308 (1976), because clemency decides whether the inmate "shall live or receive leniency." Id. at 1192. Ohio's clemency procedure presents an inmate with an unconstitutional condition by forcing a choice between seeking clemency and pursuing judicial remedies.

Clemency has traditionally been the last step in the death penalty scheme. As this Court has noted, clemency is the "historic remedy for preventing miscarriages of justice where judicial process has been exhausted." Herrera, 560 U.S. at 411. In the case at hand while Mr. Woodard was, and is, pursuing his post-conviction remedies the State of Ohio initiated the clemency process. Neither the Clemency Procedure or the APA advised Respondent whether remaining silent, refusing an interview, or anything he states during the interview can be used against him in both future prosecutions and the current proceedings, thereby, forcing Respondent into an unconstitutional choice. Respondent is forced to choose between seeking clemency or post-conviction remedies. This unconstitutional choice offends the death penalty scheme and the Fifth Amendment of the Constitution of the United States.

The State's argument that Baxter v. Palmigiano, 425 U.S. 308 (1976), is applicable to this case is without merit. Baxter involved a prison disciplinary hearing on a matter totally unrelated to the criminal charges and convictions that landed Palmigiano in prison. On the other hand, the clemency interview at issue in this case presumably will directly address the charges and convictions that resulted in Mr. Woodard's death sentence. As Mr. Woodard continues to challenge both the convictions and sentences, the State's failure to grant immunity or other Fifth Amendment protections violates Mr. Woodard's constitutional rights. See Baxter, 425 U.S. at 316-317, 318; Lefkowitz v. Turley, 414 U.S. 70, 85 (1973).

The Sixth Circuit remanded this issue to the District Court to develop the record as to what occurs during a clemency review. On the current state of the record there is no evidence what the State asks an inmate about or what the State does with any statements given by an inmate. Depending on what the State intends to do with the information, Mr. Woodard is forced into an unconstitutional condition during his clemency review. Woodard, 107 F.3d at 1189, n. 4. The District Court is better suited to determine whether Ohio's Clemency Procedure creates an unconstitutional condition on the Respondent. Therefore, the Petition for Writ of Certiorari should be denied as being untimely for this Court to consider at this time.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

DAVID H. BODIKER - 0016590
Ohio Public Defender

RICHARD VICKERS - 0032997
Post-Conviction Supervisor,
Death Penalty Division

MICHAEL BENZA - 0061454
Assistant State Public Defender
Counsel of Record

Office of the Ohio Public Defender
8 East Long Street, 11th Floor
Columbus, Ohio 43215
(614) 466-5394

COUNSEL FOR RESPONDENT
EUGENE WOODARD

48474/11#$01! doc/mjb

No. 96-1769

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

OHIO ADULT PAROLE AUTHORITY, et al.,

Petitioners,

-vs-

EUGENE WOODARD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S APPENDIX

DAVID H. BODIKER - 0016590
Ohio Public Defender

RICHARD VICKERS - 0032997
Post-Conviction Supervisor,
Death Penalty Division

MICHAEL BENZA - 0061454
Assistant State Public Defender
Counsel of Record

Office of the Ohio Public Defender
8 East Long Street, 11th Floor
Columbus, Ohio 43215
(614) 466-5394

COUNSEL FOR RESPONDENT

US CONST AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

US CONST AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

THE CONSTITUTION OF THE UNITED STATES
AMENDMENTS TO THE CONSTITUTION

US CONST AMENDMENT XIV

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each house, remove such disability.

Section 4

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

BALDWIN'S OHIO REVISED CODE ANNOTATED
CONSTITUTION OF THE STATE OF OHIO
ARTICLE III. EXECUTIVE

Current through End of 1996 portion of 121st General Assembly

O CONST III § 11 GOVERNOR HAS POWER OF EXECUTIVE CLEMENCY; LIMITATIONS

The governor shall have power, after conviction, to grant reprieves, commutations, and pardons, for all crimes and offenses, except treason and cases of impeachment, upon such conditions as the governor may think proper; subject, however, to such regulations, as to the manner of applying for commutations and pardons, as may be prescribed by law. Upon conviction for treason, the governor may suspend the execution of the sentence, and report the case to the General Assembly, at its next meeting, when the General Assembly shall either pardon, commute the sentence, direct its execution, or grant a further reprieve. The governor shall communicate to the General Assembly, at every regular session, each case of reprieve, commutation, or pardon granted, stating the name and crime of the convict, the sentence, its date, and the date of the commutation, pardon, or reprieve, with the governor's reasons therefor.

BALDWIN'S OHIO REVISED CODE ANNOTATED
TITLE XXIX. CRIMES--PROCEDURE
CHAPTER 2967. PARDON; PAROLE; PROBATION

Current through End of 1996 portion of 121st General Assembly

OH ST. Sec. 2967.07 APPLICATION FOR EXECUTIVE PARDON, COMMUTATION, OR REPRIEVE

All applications for pardon, commutation of sentence, or reprieve shall be made in writing to the adult parole authority. Upon the filing of such application, or when directed by the governor in any case, a thorough investigation into the propriety of granting a pardon, commutation, or reprieve shall be made by the authority, which shall report in writing to the governor a brief statement of the facts in the case, together with the recommendation of the authority for or against the granting of a pardon, commutation, or reprieve, the grounds therefor and the records or minutes relating to the case.

EXHIBIT A
STATE OF OHIO

DEPARTMENT OF REHABILITATION AND CORRECTION

SUBJECT: DEATH PENALTY CLEMENCY PROCEDURE	PAGE 1 OF 4
RULE/CODE REFERENCE: ORC 2967.03, 2967.04, 2967.06, 2967.07, 2967.12	SECTION: 501 NUMBER: 09
RELATED ACA STANDARDS: 2-1011	SUPERCEDES: N/A
RELATED AUDIT STANDARDS: N/A	EFFECTIVE DATE: July 21, 1994
	APPROVED: Reginald A. Wilkinson

I. AUTHORITY

This policy is issued in compliance with Ohio Revised Code §120.01 which delegates to the Director of the Department of Rehabilitation and Correction authority to manage all Divisions and Institutions of the Department and to establish such rules and regulations as he prescribes.

II. PURPOSE

The purpose of this policy is to establish a standard procedure for handling applications for clemency in death penalty cases and for review of death penalty cases where no application has been filed.

III. APPLICABILITY

This policy applies to the Ohio Parole Board and other employees of the Ohio Department of Rehabilitation and Correction, who are responsible for collecting and providing information, scheduling hearings, providing notices, etc., and to prisoners under sentence of death and the attorneys representing them.

IV. DEFINITIONS

None.

V. POLICY

It is the policy of the Ohio Department of Rehabilitation and Correction to fulfill its duties related to the executive clemency process in a manner that is expeditious and is fair to the condemned prisoner, as well as to the family and friends of the victim and the public at large.

IV. PROCEDURE

A. Notification to all condemned inmates of this policy.

1. All prisoners committed to the Department of Rehabilitation and Correction with a sentence of death shall be given a copy of this policy.

BEST AVAILABLE COPY

B. Information gathering and scheduling of the hearing:

1. At the time the Ohio Supreme Court completes its review of a criminal case upon direct appeal, and fixes an execution date, the institution or office of the department receiving notice of such decision shall forward a copy to the Parole Board.

2. Upon receipt of said notice or upon its own initiative, the Parole Board shall request an investigation into the details of the prisoner's offense, prior record and other relevant information.

3. Forty-five days in advance of any scheduled execution date, unless that date has been stayed, the parole board chair will schedule a clemency review to be held at central office. This clemency review will be scheduled to occur approximatly twenty-one days prior to the scheduled execution date. The parole board shall send any required notices to the sentencing court, the prosecutor, and the victim's family or representative.

4. The parole board shall also have a notice delivered to the prisoner advising him that he may request to be interviewed in person by one or more parole board members or hearing officers and have the board consider any statements he may make. The parole board will send a copy of this notice to the office of the public defender or other counsel for the prisoner.

5. Once the clemency review hearing has been scheduled, it shall be completed and a recommendation made to the Governor regardless of any subsequent stay of the execution of the sentence.

C. Interview of prisoner by parole board member or hearing officer.

1. The parole board chair will cause the notice advising that the board will be considering his case for a clemency recommendation to be personally delivered to the prisoner. This notice shall advise him that if he requests it in writing, he will be interviewed by one or more parole board members or hearing officers prior to the board considering his case. The notice shall advise him

that he can make the request by noting his desire for the interview on the notice and returning it to the parole board chair. The prisoner will be asked to submit to a psychological or psychiatric evaluation as determined appropriate by the Parole Board.

2. If the prisoner requests the personal interview, the parole board chair will appoint one or more board members or hearing officers to interview the prisoner at the confining institution. Only the prisoner and the person or persons assigned by the parole board chair shall be present at the interview.

D. Attendance at the hearing:

1. The hearing will be held at central office during normal business hours.

2. If the prisoner chose to be interviewed, each of the board members and hearing officers that attended the interview shall attend the hearing to present to the board any information offered by the prisoner.

3. Attendance by others at the hearing is at the sole discretion of the parole board chair.

E. The nature of the hearing:

1. At the hearing, the Parole Board will consider all available relevant information including any application for clemency that the prisoner submitted and any statement that he gave to the board members or hearing officers that interviewed him.

2. The Parole Board shall deliberate and render a decision the day of the hearing if possible.

Once the decision is made, minutes will be signed by the Parole Board and the decision communicated to the Chief Legal Counsel for the Governor.

3. Within five (5) business days after the Parole Board's decision, the Governor's Office will receive the written report and recommendation. The Parole Board will notify the prisoner, the prisoner's counsel, the prosecutor, the victim's representative and the Office of the Attorney General of its recommendation.

4. A press release shall be prepared by the Public Information Office and made available to the media after the report and recommendation have been delivered to the Office of the Governor.

F. In the event that there is insufficient time before a scheduled execution to utilize the normal information gathering or hearing process, the normal procedure shall not apply. The Parole Board shall assemble as much information as is feasible under the circumstances. Within the discretion of the chairman of the Parole Board, a hearing may be scheduled, provided, however, that there is sufficient time to arrange for the appropriate Parole Board officials to be present and that the necessary parties either receive the legally-required notice or waive such notice. In the event that a hearing is convened, the provisions of this policy governing such hearings shall apply. In the event that no hearing is held, the chairman of the Parole Board may forward an informational report to the office of Chief Legal Counsel for the Governor.

G. In the event that the Parole Board is made aware of information or circumstances not considered in its initial determination, or upon the filing of a subsequent petition on behalf of the condemned prisoner, the Parole Board may supplement its initial decision and recommendation with such informational update as may be appropriate. At the discretion of the chairman of the Parole Board, a hearing may be convened for this purpose. If such a hearing is convened, it shall be conducted according to the procedures specified in this policy for the initial consideration. Following any updated investigation or hearing, the Parole Board may elect to notify the office of Chief Legal Counsel for the Governor of an informational update to its original decision, or make a new decision and recommendation.

H. At the time of the notice of a hearing to consider clemency under this policy, or any time subsequent, the family of the victim or a representative may be given the opportunity to waive notice of any subsequent hearings or decisions.

BEST AVAILABLE COPY

No. 96-1769

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

OHIO ADULT PAROLE AUTHORITY, et al.,

Petitioners,

-vs-

EUGENE WOODARD,

Respondent.

CERTIFICATE OF SERVICE

I, Michael J. Benza, a member of the Bar of this Court, hereby certify that on this 3rd day of June, 1997, a copy of the foregoing RESPONDENT WOODARD'S BRIEF IN OPPOSITION, MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS, and AFFIDAVIT OF INDIGENCY wás deposited in a United States Mail Box, first class postage prepaid, pursuant to Rule 29.3, to Betty Montgomery, Attorney General, Jeffrey S. Sutton, State Solicitor, Simon B. Karas, Deputy Chief Counsel and Jon C. Walden, Assistant Attorney General, State Office Tower, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215-3428. I further certify that all parties requiring to be served have been served.

MICHAEL J. BENZA - 0061454
Assistant State Public Defender
Counsel of Record

COUNSEL FOR RESPONDENT